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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-839

THE STATE OF OHIO, ET. AL.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General
JAMES A. LAURENSON
Chief Counsel
ROBERT B. MEANY
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
Attorneys for Petitioner - State of Ohio

IRVING JAFFE
Acting Assistant Attorney
General, Civil Division
WILLIAM E. NELSON
STANLEY D. ROSE
PAUL T. MICHAEL
Department of Justice
Washington, D. C.
Attorneys for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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OPINION BELOW

The Temporary Emergency Court of Appeals rendered a judgment on October 25, 1973. A copy of the judgment is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court is conferred by Section 211 (g) of the Economic Stabilization Act, as amended, 12 U.S.C. 1904 (Supp II, 1972), which states:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States Court of Appeals as provided in Section 1254 of Title 21, United States Code.

QUESTIONS PRESENTED

1. Whether the federal government's attempt to control the wages and salaries of every state employee violates the Tenth Amendment by impairing the State's ability to function as a sovereign state government.

2. Assuming Congress has the power under the commerce clause to regulate state employees' wages, whether Congress had any rational basis for enacting such regulations.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional provisions involved herein is contained in Appendix B. These relevant provisions are the Tenth Amendment and Article I, Section 8, Clause 3 of the United States Constitution.

STATEMENT OF THE CASE

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 (hereinafter referred to as "pay bill") which provided for an average wage and salary adjustment of 10.6 per cent for state, county welfare, and university employees to be paid beginning with the pay period that included January 1, 1972. The State of Ohio filed an application with the Pay Board asking permission to pay these wage and salary increases. On March 6, 1972, the Pay Board decided that the total wage increase could not be paid because it exceeded the Board's wage and salary standard and instead, allowed payment of an amount equal to a seven per cent wage increase. The State's request that the Pay Board reconsider its decision and allow for payment of the total increase provided for in the pay bill was denied.

Mandamus actions were filed in the Ohio Court of Appeals, *State of Ohio, ex rel. Ervin v. Gilligan*, and the

Supreme Court of Ohio, *Fry v. Ferguson, State ex rel. Boehm v. Legatt, State ex rel. Kaiser v. Ferguson,* requesting that the responsible State officials be ordered to pay the total wage increases provided for in the pay bill. The United States was made a party in the *Ervin* case and participated as amicus curiae in the three Ohio Supreme Court cases.

Both courts ruled that the writs of mandamus should issue and ordered the State to pay the total amount of increases provided for in the pay bill. 34 Ohio St. 2d 252 1973); 35 Ohio App. 2d 84 (1973). The United States then filed this action in the United States District Court for the Southern District of Ohio asking that the State of Ohio be enjoined from paying the salary increases in question. The District Court proceeded to certify to the Temporary Emergency Court of Appeals the question of ". . . whether the Economic Stabilization Act of 1970 . . . authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations promulgated thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code."

On October 25, 1973, the Temporary Emergency Court of Appeals permanently enjoined the State of Ohio and its officers from paying the wage and salary increases to the extent that they exceeded the amount authorized by the Pay Board.

ARGUMENT

A. Congress Has Exceeded Its Powers Under The Commerce Clause In Violation Of The Constitutional Principles Of Federalism Implied In The Tenth Amendment By Attempting To Regulate State Wage

And Salary Practices Under the Economic Stabilization Act Of 1970, As Amended.

The essential issue presented by this case is whether the constitutional principles of federalism implied in the Tenth Amendment require that congressional power under the commerce clause be limited so as to not unduly interfere with the sovereign and indispensable functions of a state government. If this Court upholds the federal government's attempt, under the provisions of the Economic Stabilization Act of 1970, as amended, to control the wages and salaries paid to all employees of state and local governments, it will also be deciding that every state function can be regulated by Congress under the guise of its interference or effect on interstate commerce. On the other hand, if the Tenth Amendment is to have any meaning, and if state sovereignty is to be preserved, the scope of congressional power must be interpreted according to the "uniqueness from the point of view of intergovernmental relations," *New York v. United States*, 326 U.S. 572, 582 (1946) of the activities being regulated and the way in which they are being regulated.

State government pay practices affect the very scope, quality, and adequacy of the overall operation of the government. Because state employees have traditionally been underpaid in comparison to privately employed workers, states are faced with high turnover rates, and the inability to hire and retain necessary personnel. If Congress is allowed to control state budgetary policies by taking away from the states the right to determine the salary levels of its employees, a decision which involves basic administrative and policy decisions as to how the functions of government can be carried on, none of the exclusive prerogatives of sovereignty inherent in

the principles of federalism remain. This case, therefore, presents the question raised by Mr. Justice Douglas in his dissenting opinion in *Maryland v. Wirtz*, 392 U. S. 183 (1968); namely, "Could the Congress virtually draw up each state's budget to avoid 'disruptive effect[s] . . . on commercial intercourse'." *Id.* at 205.

It is agreed that state activities have never been totally immune from regulations when the activities were or could be performed by private enterprise. However, even *Maryland v. Wirtz, supra*, the leading case in the area and the one relied upon by the Court below in its decision, cannot be construed to permit the type of total regulation in question.

The Court, in *Maryland v. Wirtz*, in upholding the congressional decision to require states to pay certain of their hospital and school employees a minimum wage and overtime pursuant to the Fair Labor Standards Act, 29 U.S.C. §20119 (1964), made clear that Congress could not declare that all state activities so affected commerce as to allow congressional control under its commerce powers. In response to the dissenting opinion's concern that the decision would justify congressional interference with a state's budgeting activities, the Court asserted that just the opposite was intended and stressed that the activities which could be controlled would be those which were or could be performed by private enterprise. 392 U.S. at 196, n. 27. The Court continued by stating: "If a state is engaged in economic activities that are validly regulated by the federal government when engaged in by private persons, the state too may be forced to conform its activities to federal regulations." *Id.* at 197.

The Court recognized that it was not dealing with, as here, activities which only states could be involved in,

but with specific activities which could be performed by both a state and private enterprise. To that extent, the decision is no different than those involving state operation of railroads, *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936); state sale of timber, *Case v. Bowles*, 327 U.S. 92 (1946); or state involvement in other businesses. More importantly, it would be a clear misreading of the opinion to argue that it stands for the proposition that any time a state spends money, as through the payment of wages, it can be regulated by Congress for, if that were the case, every activity imaginable would come under the purview of Congress.

In the past, the issue of total control over state employee wages was once considered (but not attempted) by the federal government during World War II. In 1942, the National War Labor Board dealt with the issue of whether it had the power to oversee the maximum compensation of state and local government employees. In deciding that it and the federal government generally had no jurisdiction in the matter, the Board stated:

> It has never been suggested that the federal government has the power to regulate with respect to wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its power and jurisdiction. The employees involved in the instant cases are performing services for political subdivisions of state governments. Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would

> constitute a clear invasion of the sovereign rights of the political subdivisions of local state government. Case No. 47, Case No. 726, National War Labor Board, December 23, 1942, reported in *Rhyne, Labor Unions and Municipal Employee Law*, 226 *et seq.* (1946).

This Court has recognized that each time Congress interferes with sovereign state functions, the destruction of the states as effective political entities becomes more of a reality. In *New York v. United States*, 326 U.S. 572 (1946), the Court understood that the federal constitutional system, as expressly recognized in the Tenth Amendment, requires that certain implied limitations be placed on Congress' power to tax state activities:

> That immunity [of state instrumentalities from federal taxation] is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it . . . Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *United States v. California*, 297 U.S. 175, 184-185 (1936).

These same limitations have not yet been placed on the commerce power because, up to this time, it has been assumed that the effect on states (and the federal system) of the commerce power, could not be as great as that of the power to tax. This is implicit in the reasoning of *United States v. California*, 297 U.S. at 184. If, how-

ever, the rationale for limiting the taxing power is valid, there is no reason why the commerce power should not be similarly construed by looking "to the structure of the Constitution as . . . [a] guide." *New York v. United States*, 326 U.S. at 589.

Under the Economic Stabilization Act, Congress has attempted for the first time, to exert its powers under the commerce clause over all state activities. If these controls, and the reasoning supporting them (that the payment of money for goods and services brings a state under congressional control) are upheld, there is no logical way to stop Congress from legislatively abolishing the states as effective instruments of government. Once all activities are held to have affected interstate commerce, and that must be the ruling of this Court if the Act is ruled to be constitutional as it applies to the states, all barriers to state sovereignty have been abolished, even if, as stated by the Temporary Emergency Court of Appeals, Opinion at p. 12, the controls in question are not presently intended to be permanent. The results are best summarized by Justices Douglas and Black who stated: "The notion that the sovereign positions of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *New York v. United States*, 326 U.S. at 594 (dissenting opinion).

B. Congress Had No Rational Basis For Attempting To Regulate The Wage And Salary Practices Of The States.

Assuming, arguendo, that Congress can adopt regulations under its commerce powers which control, in some way, all of the activities of a state, the specific controls can be enforced only after it has been decided whether Congress had a rational basis for determining

that the activity being regulated has a substantial effect on interstate commerce. Therefore, before states can be bound by the provisions of the Economic Stabilization Act, it must be decided whether Congress could have rationally determined that the wages and salaries paid to state employees had such an impact on inflation as to substantially effect interstate commerce.

In making this analysis, the Court has no prior legislation or findings by Congress or past judicial decisions to rely upon. The Court's justification for upholding the application of certain provisions of the Fair Labor Standards Act to the states in *Maryland v. Wirtz, supra*, is not persuasive because that Act, unlike the Economic Stabilization Act, had a long history of prior enforcement and, more importantly, the regulations in question were clearly supported by specific congressional findings. *Id.* at 194-195. On the other hand, the Economic Stabilization Act, which purports to allow the President to control the wage and salary practices of state governments, has a much different history. No prior comparable legislation has ever been enforced by Congress against the states and the Act has no legislative history to support this unprecedented action by Congress. The only justification for such controls is based on the unsupportable presumption that state economic transactions have the same effect on commerce as those of the private sector.

Out of the various debates and committee hearings which preceded the Act's adoption and the Senate report analyzing the Act and its legislative history, the only rationale found for the imposition of these controls on states are Senator Tower's belief that it would be unfair to control the wages of private employees without doing the same to public workers, 117 *Cong. Rec.* 43, 674 (1971); Secretary Connally's statement that the size of

the state and local government work force justified the use of controls, *Hearings on H. R. 11309 Before House Comm. On Banking & Currency,* 92 Cong., 1st Sess. 342 (1971); the remarks of Congressman Williams that an increase in taxes *could* result in an increase in taxes which *could* result in an increase in the taxpayer's cost of doing business thereby causing prices to rise. *Id.* at 208, 232; and the statement in the Senate's report that states were not exempted from controls because of the possibility that the exemption could cause certain unexplained enforcement problems and could result in abuses. *S. Rep. No.* 92-507, 92d Cong., 1st Sess. (1971).

None of these positions can support a determination that Congress had a rational basis for controlling state wage practices. Senator Tower's argument would obliviate any distinction between state government and the private sector of the economy; a step that has never been proposed by Congress much less given credence by the courts. Secretary Connally's position would accomplish the same result as well as justify controls over a state whenever the state expanded or improved its activities by hiring additional personnel. The concern over enforcement problems was unsuccessfully argued once before in the context of price controls over public utilities. *Davis Warehouse Co. v. Bowles,* 321 U.S. 144, 155 (1944). Certainly difficulties with enforcing regulation of the private sector could provide no basis for justifying this attempt at seriously undermining state sovereignty.

The "tax" argument is not only illogical in view of the terms of the Act that Congress eventually adopted but, more importantly, supports a method of controlling the taxing powers of a state through indirect means. Since the Act places no controls over a state's power to tax and, as recognized by the Cost of Living Council, imposes few controls over a state's power to spend, C.O.L.C. Regs., §101.31 *et seq.*, a state can, in essence, charge what it wants for its services. Control over wages will have,

therefore, no effect on the amount of money put into the economy by the state since it can collect all the taxes its citizens agree to have imposed on them and spend whatever it wants for everything other than wages. The limitation on wage increases simply means that the money will be put back into the economy in other forms of expenditures. And if controlling wages would have a noticeable effect on the amount of taxes imposed by a state, which it does not, the control of wages for that reason would be no different than if Congress decided to limit the amount of taxes that could be collected by a state; an action clearly in violation of the Constitution.

In addition, while it is agreed that wages and salaries are major components of the cost of producing goods and services and must be offset by either an increase in productivity or prices, this has no relation to the activities engaged in by a state. Congress recognized this obvious fact when it established, under the Economic Stabilization Act, a National Productivity Policy. P. L. 92-210. This policy was developed in order to "promote efficient production, marketing, distribution, and use of goods and services in the private sector" in order to "achieve the objectives of national economic policy." *Id.* at §4(a)(1). If the productivity of state employees was crucial or necessary in the fight against inflation, one must wonder why this "national policy" was directed solely towards the private sector and the need to "foster and promote increased productivity through *free competitive enterprise.*" *Id.* at §4(a)(4) (emphasis added). The reason is obvious; either Congress recognized the clear distinction, both in fact and law, between the operation of a sovereign state government and the production of goods and services for private profit or Congress never considered including the states within that policy.

The only supportable conclusion to be drawn is that Congress never examined the alleged impact that state wages and salaries could have on inflation. It is clear

therefore that no evidence exists to conclude that Congress had any basis for exerting its commerce powers over the states. The only way this court could find that Congress had rational basis for its decision to control state wages would be if Congress had rationally decided the issue. Congress never made such an examination. This Court cannot assume what Congress never determined.

CONCLUSION

The ruling of the Temporary Emergency Court of Appeals denying to the State of Ohio its sovereign right to pay its employees the wages and salaries granted them under state law, has given to the federal government the authority to exert controls over the operation of essential state functions. Because the Temporary Emergency Court of Appeals has exclusive jurisdiction over all matters arising out of the application of the Economic Stabilization Act of 1970, as amended, this case presents what may be the only opportunity for this Court to decide whether the Act as applied to the states violates the States' sovereign rights implied in the Tenth Amendment.

Consequently, petitioner requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio
JAMES A. LAURENSON
Chief Counsel
ROBERT B. MEANY
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
(614) 466-8831
Attorneys for Petitioner - State of Ohio

APPENDIX A

(Slip Opinion)

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

FILED
TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES
OCT. 25, 1973
THOMAS R. NAPTON,
CLERK

No. 6-2
United States of America,
Plaintiff-Appellant,
v.
The State of Ohio, et al.,
Defendants-Appellees.

Paul T. Michael, (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson, Stanley D. Rose, William C. White on the brief for Appellant), Department of Justice, Washington, D. C.

Robert B. Meany, Assistant Attorney General, (William J. Brown, Attorney General on the brief) for Appellee, State of Ohio.

John A. Brown, Lucas, Prendergast, Albright, Gibson, Brown & Newman, for Appellee, Successful Relators, Ernest Fry and Thelma Boehm in Supreme Court of Ohio.

Jerry L. Riseling for Appellee, Jesse T. Kaiser, Columbus, Ohio.

Stephen S. Boynton, McIntosh & Boynton, for Amicus Curiae, Governmental Employees, Washington, D. C.

Leonard S. Sigall, for Successful Relators, James C. Ervin, et al., in the Tenth District Court of Appeals, Reynoldsburg, Ohio

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges. VAN OOSTERHOUT, Judge.

This case has been certified to this court for appropriate proceedings in accordance with § 211(c) of the Economic Stabilization Act as amended [1], hereinafter called the Act, by the United States District Court for the Southern District of Ohio. The certification was filed in this court on July 3, 1973.

The issue certified is whether the Act "authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code. [Hereinafter called Pay Bill]."

This action was commenced in the United States District Court by the Government pursuant to §§209 and 211 of the Act. The Government seeks a permanent injunction to prevent the State of Ohio from violating the Act and Executive Order 11695 by paying wages and salaries provided by the Ohio Pay Bill to State employees in execess of the amount permitted by the Pay Board Order of March 10, 1973. The certification is based upon the trial court's determination that a substantial constitutional issue is presented.

Section 211(c) provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the

> Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

The determination of whether appropriate action by this court should be limited to consideration of the constitutional issue certified or whether all issues presented by the litigation should be resolved by this court must be made upon a case-to-case basis. Consideration must be given to the fact that this court is not well equipped to conduct an extensive evidentiary hearing in event such hearing is required, and the fact that the time of three judges living in scattered parts of the country would be consumed in conducting such hearing.

In our present case, all of the record before the trial court is before us. In addition all parties except James C. Ervin, et al., relators in State ex rel. Ervin v. Gilligan, et al., in the Court of Appeals for Franklin County, Ohio, have entered into and filed with us an agreed statement of facts. Ervin, et al., state in their brief that they agree with the statement of facts set forth in the briefs of the other appellees. Thus it appears that all matters of fact are before us and that no dispute exists as to the basic material facts. Under such circumstances, it is appropriate for us under §211(c) to hear and dispose of all issues presented by this litigation.

This court has granted plaintiff's motion for an injunction pending final disposition of this case.

The issues here presented may be summarized as follows:

1. Did Congress intend to include the regulation of wages and salaries of State and local government employees within the coverage of the Act.

2. Does Congress under the Commerce Clause of the Constitution have power to regulate State and local government salaries in light of State sovereignty and the Tenth Amendment.

3. Did Congress have a rational basis for regulating the salaries of State employees.

For the reasons hereinafter set forth, we answer all of such questions in the affirmative and grant the Government the injunctive relief it seeks.

The appellees Ervin, et al., alone raise the issue that the judgment of the Franklin County, Ohio, Court of Appeals in State of Ohio ex rel. Ervin v. Gilligan, 35 Ohio App. 2d 84 (1973), holds that Congress did not intend the Act to be applicable to the State employees, barring the Government from pursuing this action under the doctrine of res judicata. We reject such contention for the reasons hereinafter stated.

BACKGROUND FACTS.

The Pay Bill Act passed by the Ohio General Assembly became effective on January 20, 1972, upon being signed by the Governor. The bill provides for wage and salary increases for State employees by way of salary adjustments, reclassifications, and step increases amounting to an average increase of 10.6% for all employees affected by the bill. Approximately 65,000 employees of the State, the State University and the County Welfare Departments were granted the increase here involved, effective for the pay period beginning with the one that included January 1, 1972.

On February 10, 1972, the case of State of Ohio ex rel. Ervin v. Gilligan was filed in the Franklin County

Court of Appeals seeking a write of mandamus requiring Ohio officials to pay the salary increases provided for in the Pay Bill. Such relief was granted by a decision handed down on May 29, 1973, reported at 35 Ohio App. 2d 84.

The State of Ohio filed an application with the Pay Board for permission to pay salary increases provided in the Pay Bill. An evidentiary hearing was afforded. The Pay Board by decision and order of March 10, 1972, denied the State's application for exception to the extent the requested increase was in excess of 7% for the current year. The State filed a petition for reconsideration which was denied. Additional requests for authority to pay the remaining amount of the salary increases provided by the Pay Bill and for reconsideration were denied.

On June 20, 1973, the Supreme Court of Ohio in the consolidated cases of Fry v. Ferguson, State ex rel. Boehm v. Legatt, and State ex rel. Kaiser v. Ferguson, 34 Ohio St. 2d, 252, determined that the state officials must pay the entire salary increases provided by the Pay Bill. The Government was not a party to that action. The decision is based on the court's determination that Congress had not authorized the regulation of State salaries and wages.

It is agreed that the salary increases involved in this litigation are those for work performed between the pay period that included January 1, 1972, and March 1972, and that pursuant to Pay Board Order of March 10, 1972, State employees had been receiving the total salary increases provided by the Pay Bill since March of 1972.[2] Approximately $10.5 million is involved in the salary increases here involved and funds have been appropriated and encumbered pending payment. In addition, approximately five million dollars in wage and salary in-

creases which have not been paid to State University and County Welfare Department employees is involved.

STATUTORY CONSTRUCTION ISSUE.

The State urges that Congress did not by the Economic Stabilization Act intend to authorize control over State wage and salary practices. Reliance is placed on the decision of the Ohio Supreme Court in *State v. Ferguson, supra.* In that case, the Ohio court held that a federal administrative body lacks jurisdiction to prevent enforcement of a State statute establishing the rate of compensation of State employees in the absence of a specific statutory grant of such power. The State relies on Parker v. Brown, 317 U.S. 341 (1943), and California v. Zook, 336 U.S. 725, 733 (1949), to support its contention. Reliance on such cases is misplaced. They did not go to the extent of holding that preemption of a field constitutionally authorized can be accomplished only by an express statement that the law applies to states. It is quite true, as stated in the cases relied upon, that preemption is not to be lightly inferred. Moreover, *California v. Zook* makes mention of lack of supporting legislative history.

The contention here urged by Ohio was rejected in Case v. Bowles, 327 U.S. 92, 99 (1946), the Court holding:

> The argument that the Act should not be constructed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses

> the word "state," courts should not construe regulatory enactments as applicable to States. This Court has previously rejected similar arguments, and we cannot accept such an argument now."

In United States v. California, 297 U.S. 175, 186 (1936), the Court holds:

> Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see Guarantee Title & Trust Co. v. Title Guaranty Co., 224 U.S. 152; United States v. Herron, 20 Wall. 251; In re Fowble, 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. United States v. Herron, supra, 255; Dollar Savings Bank v. United States, 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. . .

In Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-48 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972), the Eighth Circuit held that the federal government had preempted the field of regulating leaks of radioactive effluents of nuclear power plants. No express statement of preemption was contained in the legislation. The court held that federal preemption could be implied and listed the key factors bearing on the intention of Congress to preempt as follows:

> . . . even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied . . . . Key factors in the determination of whether Congress has, by implication, preempted a partic-

> ular area so as to preclude state attempts at dual regulation include, *inter alia:* (1) the aim and intent of Congress as revealed by the statute itself and its legislative history. . . . (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency. . . (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests." . . . (4) "whether under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations omitted) Id. at 1146-47.

It is quite true that the Economic Stablization Act does not in express language state that it applies to the States. On the other hand, there is nothing in the statute which indicates that its provisions shall not apply to the States. The extensive legislative history of the Act unequivocally reveals that Congress intended the Act and its salary and wage provisions to apply to State and local governments. The most significant evidence of such intent is that Senator Proxmire on the floor of the Senate offered an amendment to exempt the salaries of State and local government employees from the operation of the Act. Such amendment was debated and defeated by a vote of 56 to 35.[3]

The discussion of the bill in the Senate and House committees considering the bill reflects that the committees considered it necessary to cover State employees' salaries by the Act and that it was their clear intention to do so.[4]

The stabilization agencies have uniformly interpreted the Act to include States within its scope. The interpre-

tation of statutes by the administrative agency responsible for their implementation is entitled to great weight. University of Southern California v. Cost of Living Council, 472 F. 2d 1065, 1068, (Em. App. 1972). It is clear from the Act and its legislative history that Congress intended the Act to apply to wages and salaries paid State and local government officials and employees. Compliance with both the State law increasing salaries and wages and the Stabilization Act is impossible. Thus, if the government has constitutional power to regulate the areas here involved, the federal Act controls unders the doctrine of preemption.

CONSTITUTIONAL ISSUES.

The power of Congress to impose economic controls over compensation paid State and local government employees is based upon the Commerce Clause. In Murphy v. O'Brien, No. No. 1-2, ——F. 2d —— (Em. App. Oct. 10, 1973), this court was confronted with the contention that State sovereignty and the rights reserved to the States by the Tenth Amendment precludes Congress in the exercise of its power under the Commerce Clause from authorizing under the Economic Stabilization Act the power to regulate charges for services made by the State of Rhode Island. In that case, the State statute imposed vehicle parking charges on State owned beaches where no such charge had been made prior to the price freeze period. We there held:

> Otherwise valid federal legislation, *e.g.*, the Economic Stabilization Act, which incidentally interferes with state affairs has in recent times been uniformly upheld by the Supreme Court. Maryland v. Wirtz, 392 U.S. 183 (1968); Case v. Bowles, 327 U.S. 92 (1946); New York v. United States, 326

U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936) . . . .

Judge Hastings, speaking for this court, clearly sets out the reasoning and the authority upon which our decision is based. What is said in that case equally applies to our present case.

Whatever doubt may have existed with respect to the power of Congress under the Commerce Clause to regulate State activities under appropriate circumstances is resolved by Maryland v. Wirtz, 392 U.S. 183 (1968). In that case, the Fair Labor Standards Act as amended was applied to the States and the States were required to conform to the minimum wage standards and overtime provisions of the Act with respect to employees of the hospitals and schools operated by the State. The Court, after determining the operations of the hospitals and the schools affect commerce, holds:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States v. California,* 297 U.S. 175. . . . 392 U.S. at 196-197.

The Court quotes from United States v. California the following:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by

> Congress than can an individual." 297 U.S. at 183-185 (citations omitted). *Id.* at 198.

and then goes on to hold:

> The principle of *United States v. California* is controlling here. Appellants argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens. *Id.*

The State argues that if employees' salaries and wages can be controlled, then all State activities can be controlled. A similar contention was answered and rejected in Maryland v. Wirtz as follows:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. . . . 392 U.S. at 193.

The Government concedes in its brief that the Commerce Clause does not give Congress the power to regulate all State activities but that such power exists when Congress has a rational basis to conclude that the regulated State activities substantially affect commerce. As

stated in New York v. United States, 326 U.S. 572, 583 (1946):

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . .

The impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of the Act under consideration. The wage increases involved in Wirtz remain in effect indefinitely and until the law is repealed or appropriately amended. Compliance requires the State to raise additional money to make the payments. In our present case, the wage increases are temporary. The State is placed in the same position as private employers with whom the State competes for qualified employees. State expenditures are decreased rather than increased and thus no additional revenue need be raised.

Provision is made in §207 of the Act and the regulations promulgated under the Act for exceptions or exemptions in case of hardship. Such administrative consideration has been afforded the State in the present situation and partial relief has been afforded to the extent of authorizing a 7% wage increase. The Act at §202 makes the finding that it is necessary in order to stabilize the economy, reduce inflation and to protect the purchasing power of the dollar to stabilize prices, rents, wages, salaries, dividends and interest. Similar findings are made in the Presidential proclamation implementing the Act.

We find here, as we did in Murphy v. O'Brien, supra, that a rational basis exists for imposing temporary eco-

nomic controls on salaries paid by State and local governments. The State has not shown that the wage controls imposed unreasonable interference with the ability of the State of Ohio to function as a sovereign state, or that the Act and the regulations are invidiously discriminatory.

RES JUDICATA ISSUE.

As heretofore noted, the res judicata issue is raised only by the appellees Ervin, et al., who were the successful parties in the Ohio Court of Appeals for Franklin County. The res judicata defense is based upon the Government being a party to the Ohio Court of Appeals case by reason of the Court having permitted the Government to intervene. The Court's reported opinion reflects that the case was continued pending resort to administrative proceedings and that at a conference between the parties and the Court on April 6, 1973, the Court asked the parties to brief certain issues, including the following:

1. Does the Tenth Amendment preclude the Government from regulating the salaries of officers and employees of State government.

2. Is there any improper delegation of authority in Executive Order No. 11695.

The Government on April 19, 1973, filed a petition for removal to the federal court and by reason thereof took no steps to brief the issues requested by the State Court. Twenty-eight U.S.C. §1446(e) provides that after removal "the state court shall proceed no further unless and until the case is remanded." Such language is clear and unambiguous. The federal court remanded the case on June 13, 1973, on the ground that the removal was not timely, noting however that the state court's judgment rendered may 29, 1973, prior to removal, was im-

proper under §1446(e). The Government was afforded no opportunity to present its position to the State Court of Appeals.

Moreover, §211 of the Act manifests a clear intent to give federal courts exclusive jurisdiction over the constitutionality of the Acts and the validity of any action taken by any agency under the Act. The national scope of the Act, its underlying policy and the doctrine of federal preemption, should negate giving any res judicata effect to the State court judgment insofar as it relates to federal government and its authorized agencies. *See* Kalb v. Feuerstein, 308 U.S. 432, 438-439 (1940); Restatement of Judgments §71 (1942). We reject the res judicata defense.

SUMMARY

We hold that the Act, supported by its legislative history, clearly shows that Congress intended the Act to apply to states; that Congress under the Commerce Clause acted constitutionally in regulating the State salaries and wages; that the application of wage and salary restrictions to the states was reasonable and necessary to accomplish the objectives of the Act; that State sovereignty was not unduly nor unnecessarily interfered with; that the res judicata defense raised by Ervin, et al., is without merit. The Government is entitled to the injunction for which it prays.

It is ordered that an injunction issue restraining the State of Ohio and its officers from paying salary and wage increases provided for in the Pay Bill to the extent that they exceed the amount authorized by the Pay Board.

FOOTNOTES.

1. P.L. 91-379, August 15, 1970, as amended by P.L. 93-28, April 30, 1973, and P.L. 92-210, December 22, 1971.

2. The Pay Board in its March 10, 1972, order at paragraph 7 states: "The payment of the wage and salary increase submitted to the Board for approval would, if paid on and after March 17, 1972, result in the same aggregate payments as a 7 percent increase paid for the full wage year."

In its order, the Board holds: "[I]t is ordered that the application for an exception is denied to the extent that the requested wage and salary increase is in excess of seven percent (7%) for the current wage year computed pursuant to the policies and regulations of the Pay Board. . . . The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is placed in effect no earlier than March 17, 1972."

3. 117 Congressional Record 43,673, 43,677.

4. To set out the pertinent legislative history, much of which is set out in the Government's brief and appendix, would unduly extend this opinion. We note that the Senate committee specifically stated in its report on the Bill that it had rejected a number of proposed exemptions, including pay adjustments which apply to employees of State and local governments. Senate Report No. 92,507; 2 U.S. Code Cong. Ad. News, 2286, 92d Cong., 1st Sess. 1971.

In the House hearing, Secretary Connally, then chairman of the Cost of Living Council, in response to an inquiry by Representative Gonzalez as to whether State

and local government employees were exempted, replied:

> With respect to State and local governments, let me simply say that I don't think there is any question but that where Congress enacts legislation of this type it certainly is applicable to State and local governments. And it seems to me you can't equitably impose a wage-price freeze, which we are in the midst of now, on the American economy and exempt State and local employees simply because State government, local governments have increased enormously both in terms of numbers of people and in terms of dollars.

Hearings on H.R. 11309, 92d Cong., 1st Sess., parts 1 & 2, page 342.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

Tenth Amendment, United States Constitution:

The powers not delegated to the United States; nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, Section 8, Clause 3, United States Constitution (commerce clause):

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-839

THE STATE OF OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered October 25, 1973. The petition for

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[1] "Pet." refers to the petition in No. 73-839. See note 2, *infra*.

a writ of certiorari in No. 73-822 was filed on November 24, 1973. On November 28, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 73-839 to and including December 1, 1973, and the petition was filed on November 28, 1973.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether wage controls promulgated under the Economic Stabilization Act of 1970 may constitutionally be applied to the employees of state governments.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clauses 3 and 18 of the Constitution in pertinent part provide:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * And To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

STATEMENT

On January 15, 1972, the Ohio General Assembly enacted a law ("Bill 147") providing for an average wage and salary increase of 10.6 percent for state em-

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[2] Section 211(g) of the Economic Stablization Act of 1970, as amended, 12 U.S.C. (Supp. II) 1904, prescribes a 30-day period for filing a petition for a writ of certiorari to review a judgment of the Temporary Emergency Court of Appeals; that provision, unlike 28 U.S.C. 2101(c), relating to the time within which petitions for writs of certiorari in other civil actions may be filed, does not authorize the Justices of this Court to grant extensions of time for filing. We therefore believe that the petition in No. 73-389, which was filed 34 days after entry of judgment by the Temporary Emergency Court of Appeals, was untimely.

ployees effective January 1, 1972. Following the enactment of Bill 147 and its approval by the Governor, an application for an exception was filed with the Pay Board for authority to implement the increase, which exceeded the 5.5 percent wage control guidelines (6 C.F.R. 201.10; 37 Fed. Reg. 24960) promulgated by the Pay Board pursuant to its authority under the Economic Stablization Act of 1970, Pub. L. 91-379, 84 Stat. 799. In an order dated March 10, 1972, the Pay Board approved a 7 percent wage and salary increase for the employees covered by Ohio's application.[3] Upon separate petitions for mandamus, the Ohio Court of Appeals and the Ohio Supreme Court both ordered Ohio officials to pay the full amount of the wage and salary increases provided by Bill 147, notwithstanding the Pay Board order. *State ex rel. Fry* v. *Ferguson,* 34 Ohio 2d 252; *State ex rel. Ervin* v. *Gilligan,* 35 Ohio App. 2d 84.

The United States then filed suit in the United States District Court for the Southern District of Ohio, seeking injunctive relief to prevent the payment of wages or salaries in excess of those permitted by the Pay Board order. The district court determined that there was

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[3] The Pay Board found, for the purpose of determining when a wage adjustment could be implemented under the applicable regulations, that the appropriate wage year for the employees involved was from November 14, 1971 through November 13, 1972. The Pay Board permitted the full increase which was requested by Ohio, 10.6 percent, to be implemented from March 17, 1972 to November 13, 1972. This action was taken when the Pay Board determined that payment at a rate of 10.6 percent from March 13 through November 13, 1972 was equal to payment at a rate of 7 percent from November 14, 1971 through November 13, 1972. The issue here, therefore, affects only wages and salaries for the period from January 1, 1972 through March 16, 1972.

a substantial question whether wage controls promulgated under the Economic Stabilization Act could constitutionally be applied to state employees, and the court certified this question to the Temporary Emergency Court of Appeals pursuant to Section 211 of that Act.

The court of appeals held (Pet. App. A, pp. 7-22) that the Act applied to state and local government employees and that the application of the Act was constitutional under *Maryland* v. *Wirtz*, 392 U.S. 183. Accordingly, the court permanently enjoined the State of Ohio and its officers from paying wage and salary increases in excess of those authorized by the Pay Board.

ARGUMENT

Petitioners principally contend that the application of the Economic Stabilization Act of 1970 to state employees interferes with state activities of a nonproprietary, governmental character and thus is contrary to the principles of federalism incorporated by the Tenth Amendment.[4] As the court below noted, in an opinion (Pet. App. A) on which we primarily rely, the issue raised by petitioners is quite similar to the one decided by this Court in *Maryland* v. *Wirtz*, 392 U.S. 183. In that case, Maryland challenged the application of the minimum wage provisions of the Fair Labor Standards Act to the employees of state-operated schools and hospitals, contending that the extension of that Act to

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[4] Petitioners' reliance on the Tenth Amendment adds nothing to their case. This Court has properly described the Tenth Amendment as merely "a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U.S. 100, 124. Thus it is not an independent limitation on the powers of the federal government. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405-406; *Oklahoma* v. *Atkinson*, 313 U.S. 508, 534.

state employees violated "state sovereignty in the performance of governmental functions." 392 U.S. at 195. The Court rejected that contention in terms equally applicable here (*id.* at 195-197):

> This argument simply is not tenable. There is no general
>
> > "doctrine implied in the Federal Constitution that the 'two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' " *Case* v. *Bowles,* 327 U.S. 92, 101.
>
> * * * As long ago as *Sanitary District* v. *United States,* 266 U.S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. * * *
>
> * * * [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved.

Petitioners contend that *Maryland* v. *Wirtz* is distinguishable as involving only "proprietary," and not "governmental," activities. But this Court has expressly denied the relevance of that distinction when Congress acts, as it did here, pursuant to its powers under the Commerce Clause. In *United States* v. *California,* 297 U.S. 175, 183-185, the Court stated:

> * * * [I]t [is] unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. * * *

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Thus the Court in *Maryland* v. *Wirtz* concluded (392 U.S. at 195) that Congress, in exercising its commerce powers, "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."

This does not, of course, mean that Congress, in the guise of regulating commerce, can constitutionally regulate the substantive performance of state functions by "draw[ing] up each State's budget." *Maryland* v. *Wirtz, supra,* 392 U.S. at 205 (dissenting opinion of Mr. Justice Douglas). It does mean, however, that general regulations of commerce, affecting governmental and nongovernmental employers alike, are within the power of Congress. The Economic Stabilization Act does not regulate the substantive performance of state functions; it merely provides, insofar as is here relevant, that the States, in their capacities as employers, are, like private employers, restricted in the extent to which they can grant wage and salary increases. The Act "does not otherwise affect the way in which * * * [the employees'] duties are performed." *Maryland* v. *Wirtz, supra,* 392 U.S. at 193.

Petitioners further contend that the application of the Act to the States lacks a rational basis. This contention is without merit. If the federal program of wage and price controls was to be at all effective in stabilizing the economy and limiting inflation, it was imperative that

all large employers, both public and private, be subject to federal regulation. See, *e.g.*, S. Rep. No. 92-507, 92d Cong., 1st Sess. 4; 117 Cong. Rec. 43,673-43,674, 43,677.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
WILLIAM KANTER,
PAUL T. MICHAEL,
Attorneys.

JANUARY 1974.